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IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,	:	
Plaintiff/Appellee	:	
v.	:	
		Case No. 20070328-SC
DAVID SCOTT ANDERSON,	:	Case No. 20041095-CA
Defendant/Appellant	:	Appellant is incarcerated.

REPLY BRIEF OF PETITIONER ON CERTIORARI REVIEW

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FILED
UTAH APPELLATE COURTS
JAN 23 2008

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,	:	
Plaintiff/Appellee	:	
v.	:	
		Case No. 20070325-SC
DAVID SCOTT ANDERSON,	:	Case No. 20041095-CA
Defendant/Appellant	:	Appellant is incarcerated.

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IN THE SUPREME COURT OF THE STATE OF UTAH

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SUMMARY OF THE ARGUMENT

The state is incorrect when it argues that probation cannot be a sentence "the defendant is already serving" under Utah Code Ann. § 76-3-401(1)(b). Utah Code Ann. § 76-3-201(2) (Supp. 2007), located in the same chapter as section 76-3-401 (2003), specifically defines probation as a sentence. See Utah Code Ann. § 76-3-401 in Addendum A. Rules of statutory construction require that this specific provision prevail over more general language in other statutes. Additionally, the statutes the state looks to are located in different chapters and refer to different concerns. Moreover, throughout the Code, including section 76-3-401, the Legislature uses qualifying language to refer to a sentence of imprisonment, thereby indicating that the word "sentence" refers to more than just sentences of incarceration. Had the Legislature intended to limit the consecutive/concurrent sentencing decision to sentences of imprisonment, it would have

used qualifying language in section 76-3-401(1)(b). Because probation is a sentence, a trial court can impose a subsequent sentence consecutively to a sentence of probation.

A sentence of probation does not cease to be a sentence when the tolling provision of section 77-18-1(11) (Supp. 2007) applies. By its plain language, the tolling provision simply makes it clear that time that passes while a probation violation is pending does not count toward total probation time if the defendant is found to have been in violation. Even though the time is tolled, the defendant continues to be under a sentence of probation pursuant to section 77-18-1. And, if the defendant is subsequently found not to have violated probation, the time is not tolled. If the state were correct that a sentence of probation ceases to be a sentence when a probation violation is filed, the sentence would nevertheless continue in cases where a defendant was later absolved. This presents an unworkable rule because when a probation violation is pending, a judge imposing sentence in a subsequent case would have no way of knowing whether the defendant was under sentence or not.

Practical concerns also support the conclusion that the consecutive/concurrent sentencing decision must be made at sentencing and not following probation violation. The trial judge imposing sentence in the second case will have an updated presentence report and can consider all of the necessary factors and make a decision as to whether consecutive sentences should be imposed. Instead of having to make sure that the probation violation judge has an updated presentence report and conducts a sentencing hearing that complies with due process as part of the probation violation proceeding, the second sentencing judge is in a better position to fully consider the issue of consecutive

or concurrent sentencing. Such a procedure ensures that consecutive sentencing decisions are based on all of the relevant factors found in section 76-3-401(2) and not inappropriately guided by the fact that the defendant violated probation. Moreover, it precludes situations like this one where the judge who had the first case based the consecutive sentences on subsequent activity committed by the defendant after he was sentenced and placed on probation.

As a final matter, Utah's rules and statutes plainly anticipate that sentencing occur shortly after the defendant is adjudged guilty, that the judgment is entered at that time, and that the judgment include the consecutive/concurrent sentencing decision. The provision in the consecutive/concurrent sentencing statute that allows the Board to request clarification of the consecutive/concurrent sentencing order does not create trial court jurisdiction to make the decision after a defendant has been sent to prison. Moreover, that subsection was not implicated in this case. When section 76-3-401(1) is read in conjunction with Rule 22 of the Utah Rules of Criminal Procedure and other statutes, it is evident that Judge Reese did not have jurisdiction to make the consecutive sentencing decision following probation violation.

ARGUMENT

THE CONSECUTIVE SENTENCING DECISION MUST BE MADE AT SENTENCING, STATED ON THE RECORD, AND ENTERED IN THE JUDGMENT AND COMMITMENT; SINCE PROBATION IS A SENTENCE, A JUDGE CAN IMPOSE A SUBSEQUENT FELONY SENTENCE CONSECUTIVELY WITH A SENTENCE OF PROBATION THAT A DEFENDANT IS ALREADY SERVING.

The state's argument that the consecutive sentencing order must be imposed following probation revocation rather than at the time the judgment and commitment is entered is based on two incorrect, alternative claims.[1] First, the state argues that probation is not a sentence even though statutory language establishes otherwise. Alternatively, the state argues that even if probation is a sentence, it ceases to be a sentence when a probation violation is filed because the probationary time is tolled. Utah's rules, statutes and case law easily dispense with the first claim since probation is specifically defined as a sentence and Utah's statutory scheme recognizes probation as a possible sentence in a criminal case. Additionally, the fact that a defendant does not receive credit for time that passes while a probation violation is pending does not mean that a defendant is not serving a sentence. Moreover, practical and policy considerations demonstrate that the goals of the consecutive/concurrent sentencing statute are best served when that decision is made at the time of sentencing rather than following probation violation. Because the Utah Code Ann. § 76-3-401(1) plainly requires that the consecutive sentencing decision be made at sentencing and included in the judgment and commitment and Utah's statutory scheme otherwise supports this requirement, the

[1] Utah Code Ann. § 76-3-401 plainly requires that the consecutive/concurrent sentencing decision be made at sentencing and not following probation violation. Even if the state were correct that a sentence of probation cannot be a sentence "the defendant is already serving" under Utah Code Ann. § 76-3-401, the state has not provided support for its argument that the consecutive/concurrent sentencing decision can therefore be made following probation violation. In other words, even if the state were correct that probation is not a sentence under section 76-3-401, it does not automatically follow that a judge can make the decision following probation violation.

consecutive sentencing order entered in this case following probation violation should be stricken.

A. A Criminal Defendant Can Be Sentenced to Probation; a Defendant Who Has Been Placed on Probation is Therefore "Already Serving" a Sentence.

As outlined in Petitioner's opening brief, Utah Code Ann. § 76-3-401(1) requires a trial court to make the consecutive/concurrent sentencing decision after the defendant "has been adjudged guilty of more than one felony offense," to state the decision on the record, and "indicate [it] in the order of judgment and commitment." Utah Code Ann. § 76-3-401(1). The statute allows a trial court to order a sentence "to run concurrently or consecutively with any other sentences the defendant is already serving." Id. Because probation is a sentence, it qualifies as a sentence "the defendant is already serving" for purposes of the consecutive sentencing statute. See id.

First, Utah Code Ann. § 76-3-201(2) specifically states that probation is a sentence. The state acknowledges in passing that this provision allows a trial court to sentence a defendant to probation, but fails to acknowledge that the statute also explicitly defines probation as a sentence. Utah Code Ann. § 76-3-201(2) states:

> (2) Within the limits prescribed by this chapter, a court may sentence a person convicted of an offense to any one of the following *sentences* or combination of them:
> (a) to pay a fine;
> (b) to removal or disqualification from public or private office;
> (c) *to probation* unless otherwise specifically provided by law;
> (d) to imprisonment;
> . . .

Utah Code Ann. § 76-3-201(2) (emphasis added). Pursuant to "well-settled principle[s] of statutory construction," this specific, explicit definition of probation as a sentence

takes precedence over any more general statutory implication that the state argues to support its claim that probation is not a sentence under Utah's statutory scheme. Emergency Physicians Integrated Care v. Salt Lake County, 2007 UT 72, ¶19, 167 P.3d 1080 ("We acknowledge the well-settled principle of statutory construction that 'when two provisions address the same subject matter and one provision is general while the other is specific, the specific provision prevails.'") (further citations omitted).

Although this specific definition of probation as a sentence is found not only in the same title as Utah Code Ann. § 76-3-401, but also in the same chapter, the state relies on what it argues are general implications in statutes found in Title 77 to support its argument that probation is not a sentence a defendant "is already serving" within the meaning of section 76-3-401. See Respondent's brief at 10-12. This argument disregards not only the rules of statutory construction that require that the specific provision prevail, but also the organization of Utah's Code and the interrelation of statutes found within a specific chapter. Because probation is specifically included as a possible sentence in the same chapter and immediately preceding the consecutive sentencing statute, it necessarily follows that probation is a sentence the defendant "is already serving" under Utah Code Ann. § 76-3-401(1).

Rather than focusing on the specific definition of probation as a sentence found in 76-3-201, the state relies primarily on a statute discussing probation in the chapter of Title 77 pertaining to "Pardons and Paroles." See Respondent's brief at 12. Although the state is correct that Utah Code Ann. § 77-27-1(10)(2003) states "[p]robation is an act of grace by the court suspending imposition or execution of a convicted offender's sentence

upon prescribed conditions," that language is general in nature and pertinent to the role of the Board of Pardons. Because the statute does not specifically define sentences that a defendant can serve, its general language does not trump the specific language in section 76-3-201 which clearly states that probation is a sentence under that chapter. Moreover, in discussing the Board of Pardons' authority, a subsequent statute specifically refers to "persons committed to serve sentences." Utah Code Ann. § 77-27-5(1)(a) (Supp. 2007). In other words, when the Legislature needed to specify the sentences over which the Board has authority, it expressly included qualifying language demonstrating that the sentence was one of imprisonment. Id.

Including qualifying language when the statutory language involves a sentence of imprisonment rather than all possible sentences is consistent with other statutes and rules. See e.g. Utah R. Crim. P. 27(a)(2), (d)(2) & (f)(2) (referring to "a sentence that does not include a term of incarceration in jail or prison"); Utah Code Ann. §77-20-10(1) (Supp. 2007) (including qualifying language to distinguish sentences that contain "a term of imprisonment in jail or prison"); Utah R. Crim. P. 22(d) (including qualifying language to distinguish sentences where "a jail or prison sentence is imposed"); Utah Code Ann. §78-35a-302(4)(a) (2002) (including qualifying language to refer to a "sentence of imprisonment"); Utah Code Ann. § 77-15-3(1) (2003) (including qualifying language to specify a "sentence of imprisonment"); Utah Code Ann. § 76-3-208(1) (2003) (referring to "[p]ersons sentenced to imprisonment"); Utah Code Ann. § 76-3-201.1(5)(d) (2003) (allowing court to "execute the original sentence of imprisonment"); Utah Code Ann. § 63-25a-410(1)(f) (2004) (exempting "any convicted offender serving a sentence of

imprisonment" from reparations); Utah Code Ann. § 23-20-4(6) (2007) (requiring "sentence of incarceration" under certain circumstances). Moreover, the consecutive/concurrent sentencing statute contains another subsection that explicitly defines "imprisoned" as meaning that a person has been "sentenced and committed to a secure correctional facility ...." Utah Code Ann. 76-3-401(12). Hence, in the context of section 76-3-401 and other statutes, when the Legislature intends to refer only to those sentences which involve imprisonment, it includes qualifying language specifying that the statute refers to a sentence of imprisonment.

Had the Legislature intended a sentence a defendant was "already serving" to be limited to sentences where the defendant was actually imprisoned for purposes of the consecutive sentencing statute, it would have used the language found in section 76-3-401(12) and elsewhere in the Code in drafting the consecutive sentencing statute. Since the Legislature chose not to include qualifying language indicating that the consecutive sentencing decision applied only to sentences of imprisonment the defendant was already serving, yet clearly understood the distinctions in drafting section 76-3-401, sentences a "defendant is already serving" under Utah Code Ann. § 76-3-401(1) (b) are not limited to sentences where the defendant is imprisoned.

In addition to the specific definition of probation as a sentence and the lack of qualifying language indicating that the consecutive sentencing decision applies only to sentences of incarceration, other provisions of the Utah Code and Rules further demonstrate that probation is a sentence. For example, Rule 27, Utah Rules of Criminal Procedure recognizes that probation is a sentence since it allows "[a] sentence of fine,

imprisonment, or probation" to be stayed. Utah R. Crim. P. 27(a)(2). Utah Code Ann. § 20A-2-101.5(2)(a) (2007) recognizes probation as a sentence since it allows a convicted felon's right to vote to be restored when "the felon is sentenced to probation." See also e.g. Utah Code Ann. § 41-6a-505(1) (2005) (referring to probation as a possible sentence); Utah Code Ann. § 41-6a-507(3) (2005) (recognizing probation as a sentence); Utah Code Ann. § 77-36-5 (2003) (recognizing probation as a sentence).

As this Court acknowledged in Velasquez v. Pratt, 443 P.2d 1020, 1021 (Utah 1968), a person who is on probation, "is deemed to be actually serving the sentence imposed." Id. (citing Baine v. Beckstead, 347 P.2d 554 (Utah 1959)). This is consistent with Utah's statutory scheme, as outlined above and in Petitioner's opening brief, which recognizes probation as a sentence. It is also consistent with Utah procedure, which requires that sentence, which can be a sentence of fine, probation or imprisonment, be imposed from two to 45 days after verdict or plea. Utah R. Crim. P. 22(a). Contrary to the state's argument, probation is a sentence and under section 76-3-401, it can be a sentence "the defendant is already serving." Id. Accordingly, when Judge Atherton sentenced Anderson, he was already serving a sentence on the prior theft case. Pursuant to Utah Code Ann. § 76-3-401(1), Judge Atherton was therefore the appropriate judge to decide whether the two cases were to run consecutively, not Judge Reese following the subsequent probation violation determination.

B. A Defendant is Still Serving a Sentence Even if He is Charged with a Probation Violation

The state argues alternatively that even if a sentence of probation is a sentence, it ceases to be sentence when a probation violation report is filed because of the tolling provision of Utah Code Ann. § 77-18-1(11). This argument fails because (1) it is not supported by the plain language of Utah Code Ann. § 77-18-1(11) or any other statute; and (2) it is illogical and unworkable.

Although the probation period is tolled and any time that passes while the probation violation is pending does not count toward the probationary time when a defendant is found to be in violation of probation, nothing in Utah Code Ann. § 77-18-1(11) suggests that a probationer who has been charged with a probation violation is not serving a sentence. Utah Code Ann. § 77-18-1 shows that a defendant remains under sentence while the probation violation is pending. In fact, were it not for the sentence of probation, there would be no basis for a probation violation report or hearing; if the state were correct that the sentence of probation ceases to exist when a probation violation report is filed, trial courts would not have authority to proceed with probation revocations.

The state is correct that Utah Code Ann. § 77-18-1(11) requires that "[t]he running of the probation period is tolled" when a probation violation report is filed or an order to show cause is issued (Utah Code Ann. § 77-18-1(11)(b)) and "[a]ny time served by a probationer outside of confinement" after a probation violation is charged does not count to the total probation time "unless the probationer is exonerated." Utah Code Ann. § 77-

18-1(11)(a)(i). But these provisions say only that a defendant cannot count the time toward the total probation time; they do not say that the defendant is not serving a sentence.

Rather than establishing that probation ceases to be a sentence when a probation violation report is filed, the tolling provisions clarify that a defendant under a sentence of probation cannot count the time towards the total probation. Id. The tolling provision therefore requires a sentence of probation to be in place and that the sentence continue while the probation violation is pending; in fact, the probation violation procedure is part of a sentence of probation and absent a sentence of probation, there would be no basis for such a probation violation proceeding. Contrary to the state's argument, nothing in this subsection suggests that probation ceases to be a sentence when a probation violation report is filed or serves to undercut the explicit provision of section 76-3-201 that probation is a sentence.

Moreover, the state's argument that probation ceases to be a sentence when a probation violation report is filed contains obvious practical limitations. The state seems to assume that any time a probation violation report is filed, the defendant will be found in violation of probation and the sentence of probation will therefore cease to exist at the time the probation violation report is filed. See Respondent's brief at 13. But in cases where a defendant is found not to have been in violation, the defendant does receive credit toward the probationary period for the time during which the probation violation was pending. Utah Code Ann. § 77-18-1(11). Under the state's unique argument, a defendant who was held on a probation violation and subsequently found not to have

violated probation would be serving a sentence the entire time whereas a defendant who is found to have violated probation would cease to serve a sentence at the time the probation violation report is filed. A judge in another case who was imposing sentence while a probation violation was pending in an earlier case would have no way of knowing, if the state's argument were correct, whether the person was "already serving" a sentence. This makes the state's argument under section 77-18-1(11) that a sentence of probation ceases to be a sentence when a probation violation is charged unworkable from a practical standpoint.

Because the language of Utah Code Ann. § 77-18-1(11) and practical considerations fail to support the state's novel claim that a sentence ceases to exist when a probation violation report is filed, the state's claim that Anderson was not serving a sentence because a probation violation report was filed fails.

C. Practical Considerations Further Demonstrate that the State is Incorrect that Probation is not a Sentence for Consecutive/Concurrent Sentencing Purposes

As the dissent in this case noted, "[t]he majority's definition of 'already serving' may often lead to illogical results." State v. Anderson, 2007 UT App 68, ¶ 24, 157 P.3d 809 (Davis, J., dissenting). Practical considerations in addition to the problems outlined by the dissent and in Petitioner's opening brief further demonstrate that the majority's resolution was incorrect. That resolution allows a trial court to impose a sentence consecutively with another sentence even though the crime in the other case occurred after the crime in the case at issue. It also allows imposition of consecutive sentences even though the judge overseeing the probation violation generally does not have an

updated presentence report and is imposing consecutive sentences based on the fact of the probation violation rather than the factors outlined in Utah Code Ann. § 76-3-401(2). In this case, where Judge Atherton imposed judgment for the second criminal episode and had the benefit of an updated presentence report, practical considerations favor her making the consecutive/concurrent sentencing decision at sentencing instead of Judge Reese following probation revocation.

As the dissent pointed out, the majority's decision is illogical and impractical in part because a probationary sentence that included jail time would trigger the consecutive sentencing statute whereas a probationary sentence without jail time would not. Anderson, 2007 UT App 68, ¶24 (Davis, J., dissenting). Instead of providing trial courts with clear guidance as to which court makes the consecutive/concurrent sentencing decision, the majority's decision seems to suggest that Judge Reese would not have been free to impose consecutive sentences if Anderson had actually served jail time as part of probation. The illogical and inconsistent application of the majority's decision further demonstrates that it is incorrect.

The majority's decision is also unworkable because it allows a judge to impose consecutive sentences based almost entirely on the fact of the probation violation rather than based on the factors set forth in section 76-3-401(2) after a full sentencing hearing. The judge at the probation violation hearing may not have an updated presentence report. While the second sentencing judge generally has an updated presentence report and holds a full sentencing hearing that complies with due process and considers all relevant sentencing factors, ensuring that the probation violation judge also gets an updated

presentence report and conducts a complete sentencing hearing would be necessary for the judge to apply the section 76-3-401 factors and comply with due process and Utah Rules of Criminal Procedure 22. The majority's decision also allows imposition of consecutive sentences in a crime that occurred first; that happened in this case where Judge Reese imposed consecutive sentences even though the theft crime occurred and was adjudicated prior to the robberies. Judge Atherton, who possessed an updated presentence report and detailed facts about the new crime, was in a better position to apply the statutory factors and assess whether consecutive sentences were appropriate. Hence, the majority's decision allows consecutive sentences to be imposed based solely or primarily on the fact of the probation violation rather than a balanced consideration of the factors set forth in section 76-3-401(2).

The unpublished decision in State v. Workman, 2007 UT App 199U, further demonstrates the impracticality of allowing the probation violation judge to make the consecutive/concurrent sentencing decision following revocation. The state is correct that the consecutive/concurrent sentencing decision was made following probation revocation in Workman. But Workman did not address the issue in this case as to whether the probation revocation judge had the authority to order consecutive sentences following probation revocation, so Workman does not provide direct support for the state's position. Workman does, however, show the difficulties that occur in fairly determining the propriety of consecutive sentences when the probation revocation judge makes the decision. In fact, after imposing consecutive sentences, the probation violation judge in Workman retained jurisdiction "to make a change as to the consecutive sentence

if there is a recommendation" from the other sentencing court. Id. at ¶ 2. The probation violation judge apparently recognized that the judge who would be sentencing Workman on the new case would be in a better position to assess the consecutive/concurrent sentencing decision as part of a complete sentencing proceeding. Accordingly, the probation violation judge suggested that he might be willing to defer to the decision of the other court. Rather than suggesting that the state's position provides the better procedure, Workman highlights a problem in allowing the probation violation judge to make the consecutive/concurrent sentencing decision.

The majority's decision in this case further impacts on the finality of judgments, the timing for filing an appeal and Utah criminal procedure in general. Although a judgment is considered final when judgment is entered, allowing a consecutive sentencing determination to be made following probation violation injects a lack of finality. Although historically and pursuant to Utah Code Ann. § 77-18-1(12), trial courts have been limited to revoking probation and executing the original sentence, the majority's new rule allows courts to actually impose an additional and harsher sentence following probation revocation. Under the majority's decision, a criminal defendant might appeal from the initial sentence as an abuse of discretion, then file a second appeal after probation revocation, arguing factors similar to those argued in support of the abuse of discretion at sentencing to establish that the trial court abused its discretion in imposing consecutive sentences. Allowing Judge Reese to impose consecutive sentences following probation violation was contrary not only to the language of section 76-3-

401(1) but also violated established procedure which consistently recognizes that final judgment is entered shortly after a criminal defendant is adjudged guilty.

D. Under Utah Law, the Consecutive/Concurrent Sentencing Decision Must be Made at Sentencing and Entered in the Judgment and Commitment.

As previously outlined, Utah's statutes and rules contemplate that a criminal sentence, including the consecutive sentencing decision, be stated on the record and entered in the judgment and commitment, ordinarily between two and 45 days after plea or verdict. See e.g. Utah Code Ann. § 76-3-401(1). Utah's statutes and rules work together to ensure that trial courts have the tools necessary to make an informed sentencing decision at that time, and also to ensure that a final judgment allowing a timely appeal is in place shortly after verdict or plea, regardless of whether the defendant is placed on probation. As has been shown, requiring that the consecutive/concurrent sentencing decision be made at sentencing and entered in the judgment is consistent with the plain language of Utah Code Ann. § 76-3-401, other statutes, and practical considerations; it is also consistent with the requirements of Rule 22 of the Utah Rules of Criminal Procedure and is not undermined by the clarification provision of Utah Code Ann. § 76-3-401(4).

Rule 22 of the Utah Rules of Criminal Procedure further demonstrates that section 76-3-401(1) requires that the consecutive/concurrent sentencing decision be made at sentencing and not following probation violation. Rule 22(a) uses language similar to that in section 76-3-401(1) when it requires that sentencing occur shortly after a person is adjudged guilty. Rule 22(a) is also consistent with Utah Code Ann. § 76-3-401(1) in

requiring that the prosecutor and defendant be allowed to present evidence relevant to sentencing – and the consecutive/concurrent sentencing decision – at the sentencing hearing held shortly after a person is adjudged guilty. Rule 22(c) is likewise consistent with section 76-3-401(1) in indicating that sentence is imposed and judgment and commitment is entered shortly after a person is adjudged guilty, and not following probation violation. Because section 76-3-401(1) requires that the consecutive/concurrent sentencing decision be made at sentencing and indicated in the order of judgment and commitment, and Rule 22 works hand in hand with this statute to outline the procedure for a fair sentencing, Rule 22 further demonstrates that the consecutive/concurrent sentencing decision must be made at sentencing.

The provision in Utah Code Ann. §76-3-401(4) which allows the Board of Pardons to "request clarification from the [trial] court" if the judgment does not contain a consecutive/concurrent sentencing order does not change the requirement that the consecutive/concurrent sentencing decision be made at sentencing and not following probation violation. Although Utah Code Ann. § 76-3-401(4) does allow the Board to ask for clarification if the judgment and commitment does not contain a consecutive/concurrent sentencing order, it does not authorize the trial court to make the decision after judgment has been entered and jurisdiction has been transferred to the Board of Pardons. Utah Code Ann. § 76-3-401(4) states:

> (4) If a written order of commitment does not clearly state whether the sentences are to run consecutively or concurrently, the Board of Pardons and Parole shall request clarification from the court. Upon receipt of the request, the court shall enter a clarified order of commitment stating whether the sentences are to run consecutively or concurrently.

Id. Although this section was meant to clarify that the Board need not presume that sentences are to run concurrently if the judgment does not explicitly state otherwise (see former Utah Code Ann. § 76-3-401 (2002)), it simply affects the procedure that can be utilized by the Board for clarification if the judgment is not clear and does not create jurisdiction for further proceedings in the trial court.

Additionally, if the trial court were to consider the question of consecutive sentences for the first time upon receipt of a letter from the Board, the court would be required to hold a hearing and consider all of the factors outlined in Utah Code Ann. §76-3-401(2) in order to comply with statutory, rule and due process requirements. Nothing in this section or elsewhere in the Code grants the trial court jurisdiction to consider sentencing matters in a criminal case after judgment has been entered, the defendant has been committed to prison, and jurisdiction has been transferred to the Board of Pardons. When section 76-3-401 is read as a whole, it is evident that subsection (4) is meant to do nothing more than do away with the presumption of concurrent sentences and instead allow the Board to receive clarification regarding a previously imposed sentence.

Moreover, subsection (4) was not implicated in this case because the Board did not request clarification of the sentence and the judgment Judge Atherton entered did not require clarification. By its plain language, section 76-3-401(4) applies only when the Board requests clarification in a case; that has not occurred here. And, because Judge Atherton considered the issue and imposed concurrent sentences for the two felony counts in her case but did not order that the counts run consecutively with Anderson's

other case even though Anderson had previously been convicted of theft and a probation violation was pending, the Board may well consider Judge Atherton's judgment to be clear and not require clarification. In other words, because Judge Atherton considered the issue and determines that concurrent sentences were appropriate, her judgment did not require clarification. Hence, subsection (4) is not implicated in this case and did not create jurisdiction for Judge Reese to make the consecutive sentencing decision following probation revocation.

As outlined above, Utah's statutes and rules recognize probation as a sentence and require that the consecutive/concurrent sentencing decision be made at sentencing and not following probation violation. The unworkability of allowing the decision to be made after a probation violation further demonstrates that the court of appeals incorrectly upheld the procedure. In this case, where Judge Reese imposed a consecutive sentencing order following probation revocation, that order should be stricken.

CONCLUSION

Petitioner, David Scott Anderson, respectfully requests that this Court overturn the decision of the court of appeals and order that the consecutive sentencing order imposed by Judge Reese be stricken.

SUBMITTED this 23rd day of January, 2008.

Joan C. Watt

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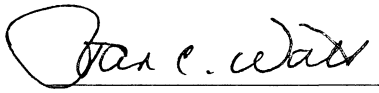
CERTIFICATE OF DELIVERY

I, Joan C. Watt, hereby certify that I have caused to be hand-delivered the original and nine copies of the foregoing reply brief to the Utah Supreme Court, 450South State, 5th Floor, Salt Lake City, Utah 84114-0230, and four copies to the Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854, this 23rd day of January, 2008



JOAN C. WATT

DELIVERED this ___ day of January 2008.

(a) if the aggregate maximum term exceeds the 30-year limitation, the maximum sentence is considered to be 30 years; and

(b) when indeterminate sentences run consecutively, the minimum term, if any, constitutes the aggregate of the validly imposed minimum terms.

(9) When a sentence is imposed or sentences are imposed to run concurrently with the other or with a sentence presently being served, the term that provides the longer remaining imprisonment constitutes the time to be served.

(10) This section may not be construed to restrict the number or length of individual consecutive sentences that may be imposed or to affect the validity of any sentence so imposed, but only to limit the length of sentences actually served under the commitments.

(11) This section may not be construed to limit the authority of a court to impose consecutive sentences in misdemeanor cases.

(12) As used in this section, "imprisoned" means sentenced and committed to a secure correctional facility as defined in Section 64-13-1, the sentence has not been terminated or voided, and the person is not on parole, regardless of where the person is located.

Utah Code Ann. § 76-3-401 (2003)

76-3-401. Concurrent or consecutive sentences -- Limitations -- Definition.

(1) A court shall determine, if a defendant has been adjudged guilty of more than one felony offense, whether to impose concurrent or consecutive sentences for the offenses. The court shall state on the record and shall indicate in the order of judgment and commitment:

(a) if the sentences imposed are to run concurrently or consecutively to each other; and

(b) if the sentences before the court are to run concurrently or consecutively with any other sentences the defendant is already serving.

(2) In determining whether state offenses are to run concurrently or consecutively, the court shall consider the gravity and circumstances of the offenses, the number of victims, and the history, character, and rehabilitative needs of the defendant.

(3) The court shall order that sentences for state offenses run consecutively if the later offense is committed while the defendant is imprisoned or on parole, unless the court finds and states on the record that consecutive sentencing would be inappropriate.

(4) If a written order of commitment does not clearly state whether the sentences are to run consecutively or concurrently, the Board of Pardons and Parole shall request clarification from the court. Upon receipt of the request, the court shall enter a clarified order of commitment stating whether the sentences are to run consecutively or concurrently.

(5) A court may impose consecutive sentences for offenses arising out of a single criminal episode as defined in Section 76-1-401.

(6) (a) If a court imposes consecutive sentences, the aggregate maximum of all sentences imposed may not exceed 30 years imprisonment, except as provided under Subsection (6)(b).

(b) The limitation under Subsection (6)(a) does not apply if:

(i) an offense for which the defendant is sentenced authorizes the death penalty or a maximum sentence of life imprisonment; or

(ii) the defendant is convicted of an additional offense based on conduct which occurs after his initial sentence or sentences are imposed.

(7) The limitation in Subsection (6)(a) applies if a defendant:

(a) is sentenced at the same time for more than one offense;

(b) is sentenced at different times for one or more offenses, all of which were committed prior to imposition of the defendant's initial sentence; or

(c) has already been sentenced by a court of this state other than the present sentencing court or by a court of another state or federal jurisdiction, and the conduct giving rise to the present offense did not occur after his initial sentencing by any other court.

(8) When the limitation of Subsection (6)(a) applies, determining the effect of consecutive sentences and the manner in which they shall be served, the Board of Pardons and Parole shall treat the defendant as though he has been committed for a single term that consists of the aggregate of the validly imposed prison terms as follows: